Supreme Court of the United States

No. 814

BRIEF IN OPPOSITION FOR THE RESPONDENTS CARL OLF SMITH AND BUTTERFIELD INC AND RED SPOT PAINT AND VARNISH COMPANY INC

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 814.

REX SCHEPP, AND BENJAMIN F. SHEPP,
Petitioners,

vs.

PRODUCERS, INC., TRAYLOR BROS., INC., INDUSTRIAL CONTRACTORS, INC., CARL WOLF, SMITH AND BUTTERFIELD, INC., RED SPOT PAINT AND VARNISH COMPANY, INC., DOUGLAS H. McDONALD, DOUGLAS H. McDONALD, TRUSTEE, AND EVANSVILLE TELEVISION, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION FOR THE RESPONDENTS CARL WOLF, SMITH AND BUTTERFIELD, INC., AND RED SPOT PAINT AND VARNISH COMPANY, INC.

OPINIONS BELOW.

The opinion of the District Court was not reported. The opinion of the Court of Appeals for the Seventh Circuit is reported at 286 F. 2d 65 (1961).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Whether or not the claims of three intervening creditors should be counted in determining the existence of the three creditors required by § 126 of the Bankruptcy Act (11 U. S. C. § 526).

STATUTE INVOLVED.

Section 207 of the Bankruptcy Act (11 U. S. C. § 607) provides:

> "The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter."

STATEMENT.

This brief in opposition is filed by Carl Wolf, Smith and Butterfield, Inc., and Red Spot Paint and Varnish Company, Inc., three intervening creditors. It deals only with those issues raised by the petitioners which directly relate to the intervening creditors. This proceeding was commenced December 19, 1958, as an involuntary petition for reorganization under Chapter X of the Bankruptcy Act (11 U. S. C. § 501). Thereafter, Carl Wolf, Smith and Butterfield, Inc., and Red Spot Paint and Varnish Company, Inc., filed their petition to intervene as additional petitioning creditors. On April 2, 1959, the District Court granted that petition. Following protracted hearings, the District Court specially found that the intervening petitioning creditors were creditors of the debtor, having claims against it, liquidated as to amount and not contingent as to liability, amounting in excess of $5000.00 (R. Ap. I, 81). The District Court further specifically found that the reorganization petition was filed in good faith (R. Ap. I, 84).

ARGUMENT.

The petitioners would have this Court take jurisdiction to reverse findings of fact of the District Court affirmed by the Court of Appeals, which held that there were three separate creditors and that the proceeding was filed in good faith. This Court has repeatedly held that it will not review conflicting evidence, but will take the findings of the trial court as being correct, unless palpably erroneous. *National Labor Relations Board* v. *American National Ins. Co.* (1952), 343 U. S. 395, 410.

In the case above cited, the Court held:

> "We stated that this Court is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other. * * * We repeat and reaffirm this rule, noting its special applicability to cases where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case."

In the case at bar there were six petitioning creditors, and the District Court found that all six of these petitioning creditors had claims against the debtor, liquidated as to amount and not contingent as to liability, amounting in the aggregate to $413,507.51. No question has been raised by the petitioners as to the good faith of the three intervening creditors, who had separate claims and who complied with the jurisdictional requisites.

Thus, petitioners are left with an argument that lack of good faith is conclusively demonstrated by reason of alleged defective affidavits. As to the affidavit of Dennis Stallings, the petitioners say affiant did not have *personal* knowledge of the contents of the affidavit. No issue is raised that the contents were not correct or completely

true, but only that the affiant did not *personally* know they were true. Surely, such sophistry can not prevail.

The other affidavit which petitioners attack is the affidavit of Ferris Traylor, wherein he states that one of the petitioning creditors, a corporation, "paid" $300,000 for an account. The evidence showed that such payment was by way of book credits and debits and there was not an exchange of cash. Of course, it is clear from the cases that "cash" is only one of the forms of payment and an obligation may be "paid" in many ways other than cash, such as by check, by off-setting accounts, by work or labor, by merchandise, or by any other item of value. Here again, petitioners predicate lack of good faith, not on the reality as shown by the evidence, but upon pure technicality and petitioners' erroneous definition of the word "paid." In any event, the District Court found, as a fact, against the petitioners, which finding was substantiated by the evidence; and this finding of fact was affirmed by the Court of Appeals. Surely, such an illusory, academic question presents no important federal question; and the rulings of the courts below are not in conflict with any decisions of this Court or any other court of appeals.

Petitioners raise the question as to whether or not the claims of the intervening petitioning creditors should be counted in determining whether or not the jurisdictional requisites of the three petitioning creditors are met. Section 207 of the Bankruptcy Act (11 U. S. C. § 607), which deals with Chapter X proceedings, provides:

> "The judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter."

On this point, the Court of Appeals below held:

> "Such intervention is authorized under 11 U. S. C. A. § 607. *Seaboard Terminals Corp.* v. *Western Mary-*

land Ry. Co., 4 Cir., 108 F. 2d 911, 914; and see dictum in *In Re Federal Facilities Realty Trust*, 7 Cir., 220 F. 2d 495, 500-501. We do not agree with appellants that 11 U. S. C. A. § 596 limits § 607 so as to authorize intervention only after approval of the petition. And where a creditor has been properly permitted to intervene he is to be counted in determining the existence of the requisite number of creditors. Cf. *Syracuse Engineering Co.* v. *Haight*, 2 Cir., 110 F. 2d 468; 6 Collier on Bankruptcy (14th ed.) 1424-5."

The right of intervention in this situation has never been challenged. In the case cited by petitioners, *In Re Flour Mills of America, Inc.* (D. C. Mo. 1939), 27 F. Supp. 559, 561, no cause was shown for intervention and intervention was, therefore, properly denied. Here, there is no question but what due cause is shown for intervention; and the intervention was properly granted.

Petitioners also cite *In Re Associated Gas & Electric Co.* (D. C. N. Y. 1936), 14 F. Supp. 582, 583, 584. This case in no way dealt with § 207 under Chapter X of the Bankruptcy Act, but held solely that the intervention provisions of § 77 B of the Bankruptcy Act prevail over the provisions of § 59(f). Further, no cause was shown for intervention. A full answer on this point, however, is that the petitioning creditors do not rely upon § 59(f), but rely upon § 207 of the Bankruptcy Act and Rule 24 of the Federal Rules of Civil Procedure. There are, thus, no cases in conflict with the opinion of the Court of Appeals herein holding that such intervention was proper.

CONCLUSION.

The decision of the court below is clearly correct and no substantial questions meriting further review are presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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